Senator KENNEDY. I have a question, Judge, and that is, I want to be clear on the standing committee's conclusion with regard to Judge Kennedy's former membership in the Olympic Club. It seems clear that you did not believe that his former membership affected your overall assessment of his qualifications for the Supreme Court, largely because he had tried to change the discriminatory policies and because he had resigned when the club's membership refused to change those policies.

My question is: Would the ABA standing committee view a federal judge's continuing membership in an exclusive club that discriminated on the basis of race or sex as adversely affecting the nominee's qualifications for elevation to a higher federal court?

Judge TYLER. Well, of course, what happened, we, as you know, looked into this considerably. Earlier, Chairman Biden wrote us a letter pointing out the language of Canon 2 of the Judicial Canon of Ethics. You fairly summarized, I think, how we came out. Because of what happened, our committee unanimously concluded that this business of membership in the Olympic Club was not a disqualifying factor here at all.

Very briefly, the record, as we understand it, is that he was a non-voting, non-resident member for years. Back early in 1987, it came to his attention, when the open golf tournament was played in the Bay area, and I think also through an article which appeared in the New Yorker Magazine dealing with the history of the Olympic Club, that nothing had been done to change the rules about admission of women and perhaps minorities. He then endeavored to work within to persuade the officers and others who had control of club policies to change. They had a referendum; it did not come out the way he hoped. I think your committee has before you copies of two letters that he wrote in August of this year about the problem to counsel for the club. Finally, he resigned early this fall.

I suppose that one could say, looking at this record, that maybe he might have been more sensitive to the problem earlier than he was, but we concluded that, on balance, he behaved in a respectable, responsible fashion and tried to live up to the sensible commands of canon 2.

Furthermore, I think it is perfectly fair, as your question suggested, Mr. Chairman, that this matter should be looked into, and I hope you understand that we do the same in respect to this problem, not only with regard to Supreme Court of the United States nominees, but, as well, lower court nominees.

Finally, I would say, as I am sure the committee is aware, if you read the commentary under Canon 2 of the Judicial Ethics, that commentary makes two things very clear: First of all, what is invidious discrimination practiced by an organization is a complex question; and, second, in the last analysis, of course, the canon leaves it up to the conscience and good sense of the judge himself.

It seems to us, that it is important to keep in mind those two commentaries when this kind of a problem is appraised.

Senator KENNEDY. Your ABA standing committee on the ethics and professional responsibility explained the term "invidious discrimination" as follows: An organization ordinarily would be considered to discriminate invidiously when it is exclusive, rather than

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inclusive; excludes from membership persons solely on the basis of their race, sex, religion, or national origin; and, third, such exclusions stigmatizes such persons as inferior. It does not, in that particular term, use the expression that there had to be an intention of those that drafted the bylaws; effectively, what you are talking about is the effect of those rules, regulations, standards, are you not?

Judge TYLER. Well, you see, the courts deal with the concept or phrase "invidious discrimination" on the whole by viewing it as a problem of whether or not there was intentional or purposeful discrimination. Some people think that that is not the way to approach the problem.

Senator KENNEDY. What is your position?

Judge TYLER. Some people argue that you should only view this as to the effect. I do not think that it is terribly significant to argue that point one way or another. I think the real problem, and I think the way we approached it in our deliberations, was: Was there any evidence that Judge Kennedy purposely intended to be part of an organization that purposely discriminated against somebody? Second, we construed it in terms of what was the effect and what did he do about it.

It is on those two broad approaches that we viewed the problem and concluded that, under the facts that are pretty well known now, this history—particularly with respect to the Olympic Club—is not a disqualifying factor.

Senator KENNEDY. I am as interested right now to try and find out what the standard is in terms of future judges. It is an important message as well.

If I can just mention this point, if you have a situation where as a result of existing regulations, and it is a business club and the effect of whatever the rules and regulations or understandings all is to deny the involvement of women in a club where business associations and meetings and contacts take place, or denies the opportunity for minorities to participate, would you find it permissible—or do you find it objectionable—for members of the federal judiciary to continue membership in those clubs?

Judge TYLER. Yes, I think we would. That is why I said a few moments ago that it does not only apply to Supreme Court nominees.

Senator THURMOND. Judge Tyler, do you mind speaking in your microphone so we can hear you better?

Judge TYLER. I beg your pardon. I will do that, Senator.

As I said a few moments ago, I think where, as you point out, the record shows that a club is really used for business and professional associations, meetings and so on, a judge should really, under canon 2 and common sense, avoid that type of place. It leaves open, however, the question of whether or not he should attempt to persuade, for a while at least, that organization to change its policies.

I mention that because this has occurred recently in my own city of New York where we have now a law which deals with this very problem.

Second, also, of course, I think our committee has to be concerned whether or not a judge is continuing to be a member of a club where he is well aware that there is purposeful activity to dis-

criminate against women and minorities So long as that is truly a club where it is not small and it is not confined closely to simple social events, et cetera.

I do not think there is any doubt that this committee for some time has been concerned about approaching the problem on these two levels.

Senator KENNEDY. I appreciate your response. I know you agree that it is vitally important that all segments of the population have confidence in the fairness and the impartiality of the judiciary, and a judge's membership in a discriminatory club obviously undermines that confidence. A judge who hears a gender discrimination case in the morning and then has lunch at an all-male club is just not going to inspire the public's confidence.

Judge TYLER. Yes. You are dealing, of course, with the appearance problem. We would agree that the appearance problem, among others, is important.

Mr. ELAM. Senator Kennedy?

Senator KENNEDY. Yes?

Mr. ELAM. My name is John Elam. I was a member of the group that interviewed Judge Kennedy. You mentioned lessons for others. I think that our group was impressed in connection with this club that in the summer of 1987, before he was under consideration, he struggled with this question, brought it up to the board, and then took action in that he ultimately resigned. We were impressed by the fact that he was, over a period of time, increasingly sensitive. And I believe if you are asking what does this tell others in the future, I think his action expresses something that he came to over time and advanced his consideration for a position on the Supreme Court.

Senator KENNEDY. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I am not too convinced that someone should be disqualified if he belongs to a group of men who want to just meet in a personal way, or if a woman wants to belong to a women's group that wants to meet in a personal way. For instance, you may have a group of women who have a sewing club. Why shouldn't they be allowed to have that without having men required to be there?

In other words, I am not too sure that—a few years ago we have a very high ranking officer, I think it was William French Smith, I believe, who was one who belonged to some club, and he feels there is nothing wrong with that whether there is no discrimination of those of the same category. After all, there are some differences in sexes, and there are some differences in other ways of people. So long as there is no intent to discriminate and so long as they will not discriminate when it comes to their official duties; but when it is purely personal, it seems to me it is a little different situation. People ought to be allowed to choose their own associates. I just want to throw that out to you.

Now, I want to ask this question of Judge Tyler. Judge Tyler, I believe you gave Judge Kennedy—or your committee did—the rating of well qualified. Is that correct?

Judge TYLER. Yes, correct.